



Déjà Vu All Over Again? Federal Court Blocks Trump's Second Travel Ban

Insights

3.16.17

In the most stinging legal rebuke yet to President Trump's efforts to bar certain immigrants from reaching the country's shores, a federal judge in Hawaii late Wednesday ordered the president's second travel ban be temporarily blocked on a national basis. Characterizing the second travel ban as plainly motivated by religious discriminatory animus against Muslims, District Court Judge Derrick K. Watson granted the state of Hawaii's request for a temporary restraining order, and set into motion the latest chapter of the continuing legal battle over the president's immigration policies.

Background: How Did We Get Here?

On January 27, 2017, President Trump signed a controversial executive order titled "Protecting the Nation from Terrorist Entry into the United States by Foreign Nationals," which created an immediate freeze on all entry for individuals from Syria, Iran, Libya, Somalia, Yemen, Iraq, and Sudan. Both immigrant and non-immigrant visa holders were impacted by the executive order.

Within a week, a federal district court judge in Seattle, Washington issued a nationwide restraining order as requested by the states of Washington and Minnesota, blocking the order from being enforced on a temporary basis. On February 9, the 9th Circuit Court of Appeals upheld the temporary injunction, concluding the executive order unconstitutionally interfered with the due process rights of a broad group of lawful permanent residents, aliens attempting to reenter the country after traveling abroad, refugees, and visa applicants.

The White House went back to the drawing board and crafted a second executive order, issued on March 6, 2017. Effective March 16, 2017, the new executive order aimed to create a 90-day freeze on entry for all individuals from Syria, Iran, Libya, Somalia, Yemen, and Sudan who are outside the U.S. on March 16, did not have a valid visa at 5:00 p.m. EST on January 27, 2017, and did not have a valid visa on March 16. This second executive order, titled "Protecting the Nation from Foreign Terrorist Entry Into The United States," targeted six of the same Muslim-majority countries as the original order, but excluded Iraq.

The state of Hawaii previously brought a lawsuit against the first travel ban, alleging similar arguments brought forth by the states of Washington and Minnesota, but that case was put on hold once Judge Robart in Seattle entered the temporary injunction. Upon the release of the second executive order last week, however, the Hawaii case was revived and emergency arguments were held in Judge Watson's courtroom.

Hawaii Accuses President Trump Of An “Improper Motive”

In the Hawaii litigation, the state argued the second executive order denied the constitutional rights of its citizens to freely associate with overseas family members on the basis of their religion. The state also argued the new executive order created an unfortunate stigma leading to the perception that the United States disfavored a particular religion in violation of the First Amendment.

To support its arguments, the state cited a litany of statements and tweets made by President Trump and his administration officials both before and after he was elected to office. Hawaii argued that these statements proved that the president had an “improper motive” in issuing the temporary travel ban. The state also cited to a draft report created by the Department of Homeland Security indicating citizenship status was an “unlikely indicator” of terrorism potential.

Court: “Hawaii Is Right, Travel Ban Is Blocked”

Late Wednesday, Judge Watkins issued a blistering 43-page order directly calling the president’s motives into question and blocking the second travel ban from taking effect. The judge first ruled that the state of Hawaii had legal “standing” to pursue the remedy sought because it demonstrated actual harm at its public universities and in its tourism trade. He concluded the faculty and students at Hawaii universities were deterred in their academic missions because of the travel ban, costing the state lost tuition money; and cited to declining tourism in the state from the affected countries, costing the state lost revenue.

The judge then concluded Hawaii proved it would likely succeed in its Establishment Clause claim against the president. The state argued the second travel ban violated the First Amendment because it preferred one religion over another, and the judge accepted that argument. While he agreed with the president’s lawyers that the second travel ban was “religiously neutral” in its text, he said he would not “turn a blind eye” toward the additional evidence revealing the true motive of the executive order.

The judge cited to President Trump’s past statements and said he found “significant and un rebutted evidence of religious animus” on the part of the administration when drafting this executive order. Although cautioned by the president’s lawyers to ignore “veiled” and “secret” motives that may or may not be hidden behind the scenes, the judge concluded there was nothing “veiled” or “secret” about the president’s frequent statements, and those made by his surrogates and administration officials, regarding the true purpose of the travel ban. While the second executive order may include a “stated secular purpose,” Judge Watkins concluded it was “secondary to a religious objective of temporarily suspending the entry of Muslims.” Therefore, the judge issued a nationwide temporary restraining order, effective immediately, blocking the second travel ban from taking effect.

What Does This Mean For Employers?

As a result of this decision, the status quo that we have lived with since the initial federal order blocking the first travel ban on February 3 should continue. All U.S. land and air ports of entry are prohibited from enforcing the controversial travel ban portions contained in the first or second executive orders. All Customs and Border Protection (CBP) field offices will continue to inspect

executive orders. All Customs and Border Protection (CBP) field offices will continue to inspect travelers under standard policies and procedures. All airlines and terminal operators should continue to permit boarding of all passengers without regard to their nationality.

The Department of Homeland Security will continue its standard inspections of travelers as normal. This includes the inspection and admission of people from the seven listed countries and those in the U.S. refugee program. Similarly, the State Department has reinstated any visas that had been provisionally revoked upon the issuance of the executive order, and, assuming no other issues exist, they are currently valid for travel.

It is difficult to predict what will happen next. The situation is very fluid and changing on a near-daily basis, especially given there are multiple legal arguments ongoing regarding this matter throughout the country. We can expect the Trump administration to consider all of its appellate options, and we have likely not heard the last of this matter. Therefore, it is very important that your organization confers with legal counsel to ensure the current status and application of immigration laws and policies to your workforce.

Because normal travel is continuing for the time being, we recommend that employers with affected employees outside the U.S. have such employees return to the U.S. as quickly as possible. The legal status of the court order could change at any time, however, so immediate action is essential.

If you employ workers from any of the six listed countries who are currently in the U.S., you should postpone international work-related travel and encourage them to refrain from personal travel outside the country, if at all possible. While their free travel might be permitted at present, their status could change without prior warning.

If you have affected employees with visas still in their passports, their travel should not be impaired. Their visas should have been electronically reinstated. For those employees with visas that were physically revoked, we recommend working with legal counsel to determine whether these employees should apply for a new visa or return to the country and apply for an I-193 (Application for Waiver of Passport and/or Visa) visa waiver for prompt admission to the U.S. Absent any other admissibility issues, these individuals should receive an I-193 waiver upon arrival to the U.S. For those traveling by air, airlines have been instructed to contact CBP to receive authorization to permit boarding.

Conclusion

We will continue to monitor the status of all immigration-related executive order activity, including ongoing and future litigation, and publish updates as additional actions are taken, or information is provided, by the White House or the judicial system.

If you have any questions about these developments or how they may affect your business, please contact any member of our [Global Immigration Practice Group](#), or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of recent executive action and federal court decisions. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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